

FILE COPY

Office - Supreme Court, U. S.

FILED

FEB 10 1943

CHARLES ELMORE COMLEY

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1942.

No. 554.

NATIONAL BROADCASTING COMPANY, INC., WOODMEN  
OF THE WORLD LIFE INSURANCE SOCIETY and  
STROMBERG-CARLSON TELEPHONE MANUFACTURING  
COMPANY,

*Appellants,*

vs.

UNITED STATES OF AMERICA and the FEDERAL  
COMMUNICATIONS COMMISSION.

MUTUAL BROADCASTING SYSTEM, INC.,

*Intervenor.*

**MOTION FOR TEMPORARY RESTRAINING ORDER,  
NOTICE OF MOTION AND AFFIDAVIT  
IN SUPPORT OF MOTION.**

JOHN T. CAHILL,

*Solicitor for National Broadcasting  
Company, Inc.*

E. WILLOUGHBY MIDDLETON,

*Solicitor for Stromberg-Carlson  
Telephone Manufacturing Company.*

# Supreme Court of the United States

OCTOBER TERM, 1942.

NATIONAL BROADCASTING COMPANY, INC., WOOD-  
MEN OF THE WORLD LIFE INSURANCE SOCIETY  
and STROMBERG-CARLSON TELEPHONE MANU-  
FACTURING COMPANY,

Appellants,

vs.

No. 554.

UNITED STATES OF AMERICA and the FEDERAL  
COMMUNICATIONS COMMISSION.

MUTUAL BROADCASTING SYSTEM, INC.,  
Intervenor.

## Motion for Temporary Restraining Order.

Upon the annexed affidavit of Frank E. Mullen, sworn to February 9, 1943, the complaint and all of the affidavits and papers filed herein and set forth in the transcript of record on this appeal, and all the proceedings heretofore had herein, the appellants move this Court for an order suspending the Order of the Federal Communications Commission, one of the appellees herein, in Docket No. 5060, made May 2, 1941, as amended October 11, 1941, the order involved on this appeal, until ten days after the filing in the District Court of the mandate upon this Court's decision on this appeal, in order that the *status quo* may be adequately preserved; and for such other and further relief as to this Court may seem just.

Dated: February 9, 1943.

JOHN T. CAHILL,  
*Solicitor for National Broadcasting  
Company, Inc.*

E. WILLOUGHBY MIDDLETON,  
*Solicitor for Stromberg-Carlson  
Telephone Manufacturing Company.*

# Supreme Court of the United States

OCTOBER TERM, 1942.

NATIONAL BROADCASTING COMPANY, INC.; WOOD-  
MEN OF THE WORLD LIFE INSURANCE SOCIETY  
and STROMBERG-CARLSON TELEPHONE MANU-  
FACTURING COMPANY,

Appellants,

vs.

UNITED STATES OF AMERICA and the FEDERAL  
COMMUNICATIONS COMMISSION.

MUTUAL BROADCASTING SYSTEM, INC.,  
Intervenor.

No. 554.

## Notice of Motion.

SIRS:

PLEASE TAKE NOTICE that the above motion will be sub-  
mitted to the Court at the Courthouse of the Supreme Court  
of the United States, Washington, D. C., on the day on  
which the appeal herein is called for argument, at 12:00

o'clock noon on that day or as soon thereafter as the motion can be submitted.

Dated, February 9, 1943.

JOHN T. CAHILL,  
*Solicitor for National Broadcasting  
Company, Inc.*

E. WILLOUGHBY MIDDLETON,  
*Solicitor for Stromberg-Carlson  
Telephone Manufacturing Company.*

To:

CHARLES FAHY, Esq.,  
Solicitor General,  
Department of Justice,  
Washington, D. C.

CHARLES R. DENNY, Esq.,  
General Counsel,  
Federal Communications Commission,  
Washington, D. C.

LOUIS G. CALDWELL, Esq.,  
Counsel for Mutual Broadcasting System, Inc.,  
Washington, D. C.

# Supreme Court of the United States

OCTOBER TERM, 1942.

NATIONAL BROADCASTING COMPANY, INC., WOOD-  
MEN OF THE WORLD LIFE INSURANCE SOCIETY  
and STROMBERG-CARLSON TELEPHONE MANU-  
FACTURING COMPANY,

Appellants,

vs.

UNITED STATES OF AMERICA and the FEDERAL  
COMMUNICATIONS COMMISSION.

MUTUAL BROADCASTING SYSTEM, INC.,  
Intervenor.

No. 554.

UNITED STATES OF AMERICA,  
SOUTHERN DISTRICT OF NEW YORK,  
CITY, COUNTY AND STATE OF NEW YORK, } ss.:

FRANK E. MULLEN, being duly sworn, deposes and says:

I am a Vice President and General Manager of National Broadcasting Company, Inc., one of the appellants herein. I am making this affidavit in support of appellants' motion to suspend the Order of the Federal Communications Commission of May 2, 1941 (as amended October 11, 1941) which is the subject matter of the appeal now pending before this Court.

This is an appeal from a district court decree dismissing a suit by appellants to set aside, annul and permanently enjoin the enforcement of the orders of the Federal Communications Commission (hereinafter called the "Commission") promulgating regulations applicable to radio sta-

tions engaged in chain or network broadcasting. For a description of the suit, I respectfully refer the Court to the Statements in appellants' briefs on this appeal.

The object of appellants' annexed motion is to restrain enforcement of the regulations for an appropriate period after April 1, 1943, or the decision of this Court on this appeal, whichever is earlier. The District Court on November 16, 1942 entered an order accompanying its opinion rendered on that date restraining enforcement of the regulations until February 1, 1943, or the argument of the appeal, whichever was earlier (R. 533-534).

After the allowance of the appeal, the Commission was requested to enter into a stipulation which would suspend the orders promulgating the regulations until ten days after the determination of this appeal or the termination of this term of the Court, whichever should occur earlier. The Commission refused to enter into such a stipulation, but on January 20, 1943 adopted the following minute:

**"BROADCAST MATTER:**

**"HEARING DOCKET**

"The Commission today suspended until April 1, 1943, or the date of the decision by the Supreme Court of the United States in cases Nos. 554 and 555, whichever is earlier, the effectiveness of the Commission's Order of May 2, 1941 in Docket No. 5060, as last amended October 11, 1941."

The present motion was made necessary by the failure of either the District Court's temporary restraining order or the minute to provide appellants with protection from enforcement of the regulations for the period from April 1, 1943 until the decision of this appeal, in the event that the appeal is not decided prior to April 1, 1943, and for a reasonable period after the decision of the appeal.

I respectfully submit that, for the following reasons, extension of the restraint upon the enforcement of the regula-

tions for ten days after the filing in the District Court of the mandate upon this Court's decision on the appeal would be appropriate in this case, regardless of whether the decision below is reversed or affirmed.

If the decision below is reversed, it is clear that appellants should be protected by a temporary restraining order and injunction until final determination of the action.

The reasons for the granting of such relief as is requested herein are set forth in the Findings of Fact and Conclusions of Law upon which the restraining order of the District Court was based, as follows (R. 533):

1. That if the Federal Communications Commission, pending the plaintiffs' appeal to the Supreme Court from the judgment of this court dismissing the complaint herein, enforces its regulations, issued in their amended form on October 11, 1941, and if these are invalid; the plaintiffs will be seriously and irreparably damaged."

Facts amply supporting these Findings and Conclusions as to appellants' right to a stay pending the appeal are fully set forth in the affidavit of Niles Trammell, verified October 30, 1941 (R. 225-253), before this Court in *National Broadcasting Company, Inc., et al. v. United States of America, et al.*, October Term, 1941; No. 1025, the affidavit of Frank E. Mullen, verified January 3, 1942, with exhibits annexed (R. 429-443) on appeal No. 554, and affidavit of Frank E. Mullen, verified August 31, 1942, with exhibits annexed (R. 517-521) on appeal No. 554, to which I respectfully refer the Court in lieu of repetition of such facts in this affidavit. The danger of irreparable injury to National Broadcasting Company, Inc. and Stromberg-Carlson Telephone Manufacturing Company if enforcement of the regulations is not restrained is as great now as it was when those affidavits were made.

If the decision below is affirmed, appellants should be given a reasonable opportunity to make whatever arrangements are necessary with its 139 affiliated stations.



Ten days after the filing of the mandate is the very minimum amount of time which National Broadcasting Company, Inc. will need.

The pressing need of appellants for a stay until the filing in the District Court of a mandate upon this Court's decision on this appeal, and for a period of ten days thereafter, is to be contrasted with the lack of any showing by the appellees of any urgent public interest. The District Court pointed out in its Findings of Fact (R. 533):

"III. That the Commission, in the hearings leading to the said regulations and especially in its consideration of the evidence taken thereon, did not indicate that their immediate enforcement was a matter of urgent public interest."

WHEREFORE, appellants National Broadcasting Company, Inc. and Stromberg-Carlson Telephone Manufacturing Company pray that this Court enter an order granting the relief set forth in the accompanying motion.

FRANK E. MULLEN  
(FRANK E. MULLEN)

Subscribed and sworn to before me }  
this 9th day of February, 1943. }

FLORENCE E. MARGER  
Notary Public.

Queens Co. No. 2625 Reg. No. 6868

Cert. Filed in N. Y. Co. No. 573 Reg. No. 3-M-369

Commission expires March 30, 1943

(SEAL)